SUPREME COURT, U. S.

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No. 74

In the Supreme Court of the United States

OCTOBER TERM, 1969

CLIFFORD TAGGART, ET AL., PETITIONERS

v.

WEINACKER'S, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney, National Labor Relations Board,
Washington, D.C. 20570.

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

On October 13, 1969, the Court granted certiorari in this case. The basic questions presented are: (1) whether the National Labor Relations Act preempts state court jurisdiction to enjoin peaceful picketing conducted on publicly used but privately owned sidewalks adjacent to a retail store for the purpose of supporting a lawful strike called by the employees' certified union representative; and (2) whether the injunction abridges free speech in violation of the First and Fourteenth Amendments to the United States Constitution.

Similar questions were presented to this Court two Terms ago in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, No. 478, October Term, 1967, 391 U.S. 308, and the Board filed a brief discussing the preemption question and urging reversal on that ground. However, this Court found that the preemption issue had not been raised in the state courts, and proceeded to consider the constitutional claim. 391 U.S. at 313 n. 6. In the present case the preemption issue was raised and passed upon by the state courts. Since that issue is jurisdictional, we assume that it will be reached and thus we reiterate the Board's views, as applicable to the facts of this case. See also the Board's *amicus curiae* memorandum in *International Longshoremen's Association* v. *Ariadne Shipping Co., Ltd., et al.*, No. 234, this Term.

STATEMENT

On May 22, 1964, the Board certified the Retail Clerks Union, Local 458, as bargaining agent for the 41 non-supervisory employees of Weinacker's, a retail grocery and department store in Mobile, Alabama (R. 53-54). On August 31, 1964, the General Counsel of the Board issued a complaint against Weinacker's alleging that it had committed numerous unfair labor practices in violation of the National Labor Relations Act, including a refusal to bargain in good faith with the Union, the discharge of nine employees for union activities, and other acts of restraint and coercion against union adherents (R. 68-80). A Trial Examiner of the Board began a hearing

on the complaint on October 12, 1964 (R. 23).[1] On December 12, 1964, the Union called the employees out on strike and began picketing Weinacker's in support of the strike and to protest the Company's alleged unfair labor practices (R. 23).

Weinacker's owns a large plot of land in downtown Mobile. On the plot are a large building where it conducts its business, sidewalks encircling that building, a parking lot for customers, and walkways leading from the lot to the store. The parking lot separates the main entrance to the store from Government Street to the south and Catherine Street to the east by a distance, at the nearest point, of about 100 feet. (See Pet. Br. 5a). Both are public streets with public sidewalks on the Weinacker's side; Weinacker's also owns and operates an automobile service station on Catherine Street opposite its store (R. 91–92). Initially, the picketing took place on the public sidewalk adjacent to Weinacker's parking lot. Later, the pickets moved to the privately owned sidewalk fronting the main entrance to Weinacker's store (R. 92).

On January 24, 1965, Weinacker's filed a complaint against petitioners—the Union and three of its officers—in the Circuit Court of Mobile County, Alabama. The complaint described the picketing on Weinacker's premises, characterizing it as an "unlawful trespass," and asked that the Union, its officials, their agents,

[1] The Examiner issued his decision finding unfair labor practices on April 15, 1965, and, the Company having filed no exceptions, the Board adopted his decision on June 25, 1965, 153 NLRB 459. The Fifth Circuit entered a decree summarily enforcing the Board's order on June 28, 1966. *National Labor Relations Board* v. *Weinacker Bros.*, No. 23,510.

and all persons acting in concert with them be enjoined from "directly and indirectly * * * entering upon property of" Weinacker's, and from any act of "trespass" thereon (R. 1-3). The Union moved to quash the complaint the next day, on the ground, *inter alia*, that the state court lacked jurisdiction because the picketing sought to be enjoined was within the exclusive primary jurisdiction of the National Labor Relations Board, and the state court was thus preempted by federal law (R. 8). On the same day Weinacker's obtained an *ex parte* temporary injunction, prohibiting petitioners from "trespassing upon the property of [Weinacker's] and from further interfering with * * * [Weinacker's] property and right of ingress and egress to [Weinacker's] property and place of business" (R. 15-16).

The Union reasserted its preemption defense in a plea to the jurisdiction of the Circuit Court, which was overruled, and in its subsequent answer to the complaint (R. 17-23). After a non-evidentiary hearing on the Union's motion to dismiss the complaint and to dissolve the temporary injunction, the Circuit Court issued a decree continuing the injunction previously issued "until ordered dissolved by due process of law" (R. 95). The court found that "a labor dispute exists" between Weinacker's and the Union "over the matter of a collective bargaining agreement between them, and when contract negotiations broke down, the * * * Union called a strike which is now in progress," and that "[p]icket lines have been established by the Union," first "on the public sidewalks

of the City of Mobile and later on the sidewalks on the Complainant's premises and in front of the entrances to Complainant's storebuilding" (R. 91–92). The court further found that, "[w]hile this picketing on Complainant's premises and in front of the entrances to its building has been without any acts of violence or threats of violence to any persons, it has been carried on in such a manner as to obstruct the customers of the Complainant in entering or leaving the entrances to said building on the south or Government Street side thereof," and that said picketing had "continued after the Complainant * * * had requested the Respondents not to trespass on Company premises" (R. 92). Rejecting the preemption defense, the court concluded (R. 94):

> where a storeowner invites prospective customers to come to his store to trade and to park on his grounds made available thereto while doing business with the storeowner, the invitation is for one particular purpose, not for *any* purpose to the general public, and the use of the storeowner's parking lot and sidewalks is of a purely private character over which the State Courts retain jurisdiction to hear suits seeking injunctive relief to bar trespassing. * * *

The finding was supported by six conclusory and identically worded affidavits averring that the picketing had obstructed "customers in entering and leaving the door of Weinacker's" (R. 11–14); the Union's answer to the complaint denied that the pickets had obstructed customers from entering or leaving Weinacker's premises (R. 87).

On September 19, 1968 (almost three years after the case was submitted), the Supreme Court of Alabama affirmed the injunction issued by the Circuit Court. In rejecting the Union's preemption defense, it stated (R. 119–120):

> The activity enjoined in the instant case is neither protected by § 7 nor prohibited by § 8 of the National Labor Relations Act. We are of opinion that it is not reasonably arguable that the Congress intended to exclude the states from jurisdiction over trespass by picketing on privately owned property, which does not have the quasi-public character of a town street or business block, in a manner so as to obstruct entrances to a store.

ARGUMENT

THE STATE COURT LACKED JURISDICTION TO ENJOIN THE UNION'S PICKETING

A. THE PICKETING IS WITHIN THE AMBIT OF THE NATIONAL LABOR RELATIONS ACT

In *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 245, this Court held that, where "an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The picketing here is within the ambit of the Act.

"Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience

has shown are undesirable." *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 62. Indeed, Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." Section 8(b)(4)(B)'s prohibition of secondary labor pressure carries the express reservation that nothing in the ban "shall be construed to make unlawful * * * any primary strike or primary picketing." See also *Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492, 498–499. And, in regulating organizational and recognitional picketing, Congress has, with certain qualifications, explicitly excepted from prohibition "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization * * *." N.L.R.A., Section 8(b)(7)(C). In short, unless peaceful picketing falls within one of the Act's specific prohibitions, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters Union*, 346 U.S. 485, 500.

The picketing in this case publicized a strike by the store's employees to obtain a satisfactory collective agreement from their employer, after negotiations by their Board-certified union representative had failed and the employer had engaged in numerous unfair labor practices. The picketing was carried on as close as possible to the situs of the labor dispute, the sidewalk immediately adjacent to the primary employer's

place of business. Such activity is a classic example of the type of concerted activity for mutual aid or protection safeguarded by Section 7 of the Act. "The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the National Labor Relations Act." *Brotherhood of Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385. "The primary strike * * * is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. * * * Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose transport is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." *Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492, 498.

The picketing here was not removed from the ambit of the Act because it was conducted on the privately-owned sidewalk in front of Wanamaker's store instead of on the public sidewalk 100 feet away. Early in the administration of the Act, the Court recognized that the Board could make an accommodation between the employer's property rights and the employees' right to engage in organizational activity. It sustained the Board's ruling that an employer ban on union solicitation and literature distribution by employees in a plant and in the plant parking lot, during non-working time, constituted interference with organizational activity barred by Section 8(1) (now 8(a)(1)) of the Act. *Republic Aviation Corp.* v. *National Labor*

Relations Board, 324 U.S. 793.[4] Since that time, the Board has dealt with the problem of accommodation of these conflicting interests in a variety of contexts.[5]

To be sure, in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the Court held, contrary to the Board, that the employer did not unlawfully interfere with organizational activity by refusing to permit distribution of union literature by non-employee union organizers on a company-owned parking lot. In so ruling, however, the Court did not hold that the Board lacked power to balance the employer's property interests against the employees' organizational rights, but merely rejected the particular accommodation made by the Board in that case. Thus,

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[4] See, *e.g.*, *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (union organizer granted access to the only available meeting hall in a company town where that hall had been used for other "public" purposes); *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (C.A. 6) (union organizer granted access to company-owned logging camp to solicit membership); *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. 2d 149 (C.A. 2) (union representative granted access to company ship to discuss grievances with unlicensed personnel); *Fafnir Bearing Co.* v. *National Labor Relations Board*, 362 F. 2d 716 (C.A. 2) (union representative granted access to plant to conduct an independent time study); *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375, 380 (C.A. 7) (union solicitation by non-employees permitted on a company-owned street connecting two company buildings, where the street was generally used by the public); and cases cited, *infra*, pp. 12–15.

[5] See also *Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492, 499 (primary character of picketing not affected by the fact "that the picketed gate * * * was located on property owned by New York Central Railroad and not upon property owned by the primary employer").

the Court recognized that, even on the private property there involved, the employer could not bar non-employee union organizers if there were a showing (absent in *Babcock*) that "reasonable efforts by the union through other available channels of communication [would not] enable it to reach the employees with its message" or that the employer had discriminated "against the union by allowing other distribution" [illegible]

[illegible] As the Court pointed out in *Garmon*, *supra*, the basic consideration underlying its preemption decisions is that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency armed with its own procedures and equipped with its specialized knowledge and cumulative experience." 359 U.S. at 242. "To leave the States free to regulate conduct . . . plainly within the central aim of federal regulation," the Court added, "involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244. As we have shown, protection of peaceful picketing on property within the central

[illegible]

[illegible] This is not a problem of plant-space in which [illegible] organization [illegible] property. Organization rights are granted to workers by the same statutes that [illegible] that protect property rights. Accommodation between the two must be obtained with a due regard for the preservation of the one as well as the maintenance of the other

aim of federal regulation." To subject the picketing here to state court jurisdiction would entail a real danger of creating the very conflicts and frustration of national purposes which *Garmon* and the other pre-emption decisions of this Court have sought to avoid.

While the prior cases involved organizational picketing rather than a strike, the same principles apply to picketing in support of a strike. Determination whether the Act affirmatively protects the union and its employee-members in picketing Weinacker's on its privately owned sidewalks immediately adjacent to its store would entail for the Board a delicate balancing of the respective interests involved. The balancing would take into account a variety of factors—*e.g.*, whether the activity was engaged in by employees or by outside union organizers, the extent to which the property involved had been opened up to the public for other purposes, whether the company's efforts to restrict picketing were necessary in order to protect its business operations or motivated by a desire to choke off organizational activity, and whether there were alternative places available where the picketing would be effectively carried on. These factors were not taken into account by the state court. It considered only the factors of trespass and alleged obstruction of Weinacker's store, and prohibited both employees and non-employees of the store from "trespassing upon the property" of the store simply on the

Section 8(a) (1) and (3) of the Act makes it an unfair labor practice for an employer to discharge or otherwise discriminate against employees for engaging in activity protected by Section

theory that Weinacker's owned the land on which the picketing occurred and had not given permission for it to be used for that purpose.

To illustrate more specifically the conflict between the state court injunction and the Act's regulatory scheme: The Act permits an employee to distribute union literature and solicit union membership on the employer's parking lot or in other nonwork areas, on nonworking time. A rule restricting the exercise of this right is invalid "in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 803, n. 10. Nor is it normally that other means of communication are available to the employees, *id.*, at 795, 799, 801, or that the union is publishing grievances and organizing. Insofar as the

represent, through picketing and other means of publicity. As this Court recognized in *Babcock & Wilcox* (*supra*, p. 10), non-employees are entitled to have access to an employer's grounds for legitimate union activity where, as here, those grounds have been opened to the public for other purposes. In *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375, 380, 382 (C.A. 7), the court sustained a Board finding that an employer had violated Section 8(a)(1) of the Act by barring non-employee union organizers from a street which, although privately owned, had been opened to the public. Similarly, in *Priced Less Discount Foods, Inc., d/b/a Payless*, 162 NLRB 872, n. 1, 877, the Board found that an employer violated Section 8(a)(1) of the Act wherein excluded from its parking lot a non-employee union representative seeking to solicit membership among its employees, although it had allowed other non-employees to use the lot to solicit for their purposes. A like violation was found in *Solo Cup Company*, 172 NLRB No. 110, 68 LRRM 1385, July 10, 1968, where an employer excluded non-employee union organizers from a privately owned industrial park housing the employer's plant; the Board based its finding upon conclusions that (1) "it would be virtually impossible for the Union, without a list of addresses, which Solo [] has refused to supply, to meet the Solo employees away from the plant premises and convey its message"; (2) "in view of the unlimited accessibility to the area established by past practices it has become through custom and use a quasi-public area"; and (3) the reason assigned for

barring or ejecting the organizers was "their union affiliation" (68 LRRM at 1386-1387).[9]

Finally, the Board found that Wemacker's had engaged in extensive unfair labor practices designed to thwart union organization, culminating in its refusal to bargain in good faith with the Union (*supra*, pp. 2-3, n. 1). Although it did not do so in this particular case, the Board has power to remedy such unfair labor practices by requiring that the employer's private property be opened to non-employee union representatives for a reasonable period of time. *Marlene Industries Corp.*, 166 NLRB No. 58, 65 LRRM 1626, 1632, July 3, 1967, enforced in this respect *sub nom., Decatur ville Sportswear Co. v. National Labor Relations Board*, 406 F. 2d 886, 889 (CA. 6). The state court injunction would collide with the Board's action should it deem it appropriate to provide such a remedy in any future cases involving Wemacker's.

For these reasons, the state court here, no less than in *Garmon, supra*, has regulated conduct which is "so plainly within the central aim of federal regulation" that a potential interference with the federal regulatory scheme can be avoided only by requiring the state court to "defer to the exclusive competence of the National Labor Relations Board" (359 U.S., at 241, 245), just as Missouri was precluded from applying its

[9] Cf. *General Electric Co.*, 137 NLRB 1549 (employer could properly exclude non-employee union solicitors from a privately-owned road leading to the plant, where adequate opportunity existed for reaching the employees at the public road entrance to the plant and there was no showing that other solicitation had been permitted on the private road).

antitrust laws to the union activity involved in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, so here Alabama may not "interfere with the National Labor Relations Act . . . apply its trespass laws broadly or blanket-fashion the Union's picketing on Wumbco's premises."

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed, and the case should be remanded with directions to vacate the injunction and dismiss the complaint for want of jurisdiction.

Respectfully submitted.

Lewis N. Gresham,
Solicitor General

Nelson Ogletree,
General Counsel

Frederick U. Reel,
Associate General Counsel

Norton J. Come,
Attorney

Lewis Susz,
Attorney
National Labor Relations Board

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